Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-451

In The
Supreme Court of the United States

MILBURN DEARING, ET AL.,

Petitioners,

v.

TEXAS PARKS AND WILDLIFE DEPARTMENT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is there a cause of action under the Texas Commission on Human Rights Act for disparate impact age discrimination, where the Texas Commission on Human Rights Act expressly states that "to determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments (29 U.S.C. Section 621 *et seq.*)" (TEX. LABOR CODE ANN. § 21.122) and where this Court is poised to decide whether such claims can be brought under the ADEA in *Smith v. City of Jackson, Miss.*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004).

LIST OF PARTIES

Respondents	Texas Parks & Wildlife Department, Andrew Sansom, in His Individual Capacity and as the Executive Director of Texas Parks & Wildlife Department, and Robert L. Cook, in His Individual Capacity And as the Executive Director of the Texas Parks & Wildlife Department
Petitioners	Milburn Dearing; Kenneth Head; and Mike Warren, Individually, and on Behalf Of all Others Similarly Situated
Petitioners-Intervenors	Alton E. Anderson, Edgar D. Baker, Kenneth L. Baker, Winston E. Bishop, Andy G. Carr, Larry H. Griffin, Kenneth N. Hand, William J. Hiles, Gary M. Hunt, Nolan B. Johnson, Jackie W. Kohleffel, Arthur L. Lawrence, William W. McClendon, Ernest B. Mobley, Timothy M. Moorman, Michael A. Pike, William O. Potts, Larry B. Rowe, Lauro R. Salinas, Benjie J. Smith, Dennis B. Thomas, Dennis M. Urban, Steve R. Vail, Michael L. Walker, Ronny O. Ward, Harvey B. Williams, Stephen Backor, Wayne G. Armstrong, Billy A. Dodd, Bobby R. Ferguson, David E. Greene, Ronald W. Kramer, Steven C. Medford, Kenneth D. Nevins, Douglas B. Parker, Charles M. Reed, Larry B. Rowe, Michael V.

LIST OF PARTIES – Continued

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PETITION FOR WRIT OF CERTIORARI

Milburn Dearing, *et al.*, petition the Court to issue a writ of *certiorari* to review a judgment of the Texas Supreme Court.

OPINIONS BELOW

The unpublished order of the Texas Supreme Court denying Petitioners' Petition for Review is at App. 1-A. The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is published at ___ S.W.3d ___, 2004 WL 35543 (Tex. App. – Austin 2004, pet. denied); it is reprinted at App. 1-B. The Order on Class Certification of the 200th Judicial District Court of Travis County, Texas is not reported in the official reporters; it is reprinted at App. 1-C.

JURISDICTION

The Texas Supreme Court entered its Order denying discretionary review on July 2, 2004. App. 1-C. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED IN THE CASE

In pertinent part, 29 U.S.C. § 625 provides:

a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age [.]

In pertinent part, TEX. LABOR CODE ANN. § 21.122 provides:

> (a) An unlawful employment practice based on disparate impact is established under this chapter only if:
>
> (1) a complainant demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, sex, national origin, religion, or disability and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity[.]
>
> [. . . .]
>
> (b) To determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments (29 U.S.C. Section 621 *et seq.*).

STATEMENT OF THE CASE

Petitioners were Field Sergeant game wardens in the Texas Parks and Wildlife Department. All of the Field Sergeants, save one, were over the age of 40. All of the Field Sergeants were reclassified to Game Warden V, which was a lower-paying position. The E.E.O.C., acting on behalf of the Texas Commission on Human Rights, found the Field Sergeants had been the victims of illegal age discrimination.

The Field Sergeants filed suit below for age discrimination under the Texas Commission on Human Rights Act, a statute that, as previously mentioned, specifically contemplates a claim for disparate impact discrimination to the extent supported by federal law under the Age Discrimination and Employment Act (ADEA). The Field Sergeants reiterated this position in their Motion for Class Certification. *See* Motion for Class Certification at 1-3, excerpted at App. 2. The trial court granted the Field Sergeants' Motion for Class Certification as to the Field Sergeants' disparate impact claim. *See* App. 1-C at 2-5. Respondents filed an interlocutory appeal of this decision. In their response brief to the Court of Appeals for the Third Supreme Judicial District of Texas ("Third Court of Appeals"), the Field Sergeants again raised this federal question. *See* Appellee's Brief at 41-44, excerpted at App. 3. The Third Court of Appeals reversed the class certification. *See* App. 1-B at 11-12. The Field Sergeants submitted a Petition for Review to the Texas Supreme Court and raised both the Texas Commission on Human Rights Act's express incorporation of the standards of the ADEA as well as this Court's grant of the writ of *certiorari* in *Smith v. City of Jackson, Miss.*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004), the Fifth

Circuit case on which the Third Court of Appeals based its decision. *See* Petition for Review at 2-5, excerpted at App. 4. The Texas Supreme Court denied the Field Sergeants' petition. *See* App. 1-A.

REASONS FOR GRANTING THE WRIT

I. The Court Below Based Its Decision Upon *Smith*, Which Is Pending Before This Court.

This Court has already decided that the question presented by this case – whether the Age Discrimination in Employment Act provides a remedy for disparate impact age discrimination – is worthy of the writ of *certiorari*. *See Smith*, ___ U.S. ___, 124 S.Ct. at 1724. The Field Sergeants simply ask that the Court grant the writ in this case in order that this question may be similarly answered as to their claims.

The availability of an age discrimination claim based on the disparate impact theory is addressed in § 21.122 of the Texas Commission on Human Rights Act:

> (a) An unlawful employment practice based on disparate impact is established under this chapter only if:
>
> (1) a complainant demonstrates that a respondent uses a particular employment practice *that causes a disparate impact on the basis of race, color, sex, national origin, religion, or disability* and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity[.]
>
> . . . .

> (b) To *determine the availability of* and burden of proof applicable to *a disparate impact case involving age discrimination,* the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 [ADEA] and its subsequent amendments (29 U.S.C. Section 621 *et seq.*).

TEX. LABOR CODE ANN. § 21.122 (emphasis added). At the time the trial court heard the motion for class certification, three federal circuits (the Second, Eighth and Ninth) had held the disparate impact theory of liability was cognizable under the ADEA, while four others (the First, Seventh, Tenth, and Eleventh) had had held it was not.[1] Although this Court had not addressed the issue under the ADEA, it had interpreted nearly identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), to encompass both disparate treatment and disparate impact theories of liability. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849 (1971).

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[1] Claims are cognizable – *Smith v. Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller v. Markham*, 635 F.2d 1027, 1032 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981)); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom, Kelleher v. Aerospace Cmty. Credit Union*, 523 U.S. 1062 (1998); *Frank v. United Airlines Inc.*, 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001).

Claims are not cognizable – *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (CA1 1999); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1076-78, 1079 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002).

Just a few days before the oral argument for this case in the Third Court of Appeals, the Fifth Circuit issued its opinion in *Smith* in which two of the three judges on the panel sided with the four circuits holding there was no cognizable claim. *Smith*, 351 F.3d at 187.

The Third Court of Appeals subsequently reversed the trial court's ruling on class certification solely on the basis of the Fifth Circuit's decision in *Smith*:

> *Smith* has declared that disparate-impact claims may not be redressed under the ADEA in this circuit. *See Smith*, at 195. We find the reasoning of the Fifth Circuit persuasive and hold that there is no disparate-impact theory of liability under the Texas Act. The trial plan contained in the district court's order certifying the class states that the plaintiffs' disparate-impact claims for age discrimination and the defendants' affirmative defenses to such claims are the only issues remaining to be tried in this class action. Because the only certified class-action claim may not be redressed under the Act, the certification order is therefore vacated, and the cause is remanded for further proceedings consistent with this opinion.

Texas Parks & Wildlife Dept. v. Dearing, ___ S.W.3d ___, 2004 WL 35543 at *11 (Tex. App. – Austin 2004, *pet. denied*). Thus, if the Fifth Circuit decided *Smith* wrongly, then this case has likewise been wrongly decided.

II. *Smith* Was Wrongly Decided.

Courts from several federal circuits have reasoned that a cause of action based on disparate impact should be allowed for age discrimination claims under the ADEA,

just as for discrimination claims under Title VII. The Ninth Circuit, for example, stated

> [w]hile it is true that the disparate impact theory first arose in cases under Title VII of the Civil Rights Act of 1964, the similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes, has led us to adopt disparate impact in cases under the ADEA.

E.E.O.C. v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984). *See also, Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2nd Cir. 1997); *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n. 2 (9th Cir. 1993); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Arnold v. U.S. Postal Service*, 649 F.Supp. 676 (D.C. 1986). "Although disparate impact analysis was developed by the Supreme Court in Title VII race discrimination cases, and has been used by the Court only in that context, other courts have widely applied disparate impact analysis to age discrimination cases brought under the ADEA." *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir. 1990). The language of the ADEA closely parallels that of Title VII, and the purposes of the two statutes are similar. Thus, many circuits conclude that disparate impact claims are permissible under the ADEA. *See, e.g., Geller v. Markham*, 635 F.2d 1022, 1032 (2nd Cir. 1980), *cert. denied,* 451 U.S. 945 (1981).

The business necessity defense, which the Department has pleaded, prohibits liability where there is a legitimate reason for an action that has a disparate impact on a protected class. This defense furnishes employers all the protection they legitimately need to defend claims such

as those asserted in this case. As this Court stated in *Griggs*,

> [w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.

Griggs, 401 U.S. at 431, 91 S.Ct. at 853. Without disparate impact liability, then artificial, arbitrary and unnecessary policies will continue to result in age discrimination.

The conclusion that disparate impact claims are cognizable under the ADEA is reinforced by the Equal Employment Opportunity Commission's settled interpretation of the Act. The E.E.O.C.'s interpretation is owed deference, as it is the executive agency charged with enforcing the Act. *See*, 29 U.S.C. § 625 (noting transfer of the enforcement authority from the Secretary of Labor to the E.E.O.C. by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978)). The E.E.O.C. has stated that "[w]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. § 1625.7(d). This interpretation, which has remained constant for more than two decades, was specifically drafted "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact

on members of the protected age group must be justified as a business necessity." 46 Fed. Reg. 47,724 (Sept. 29, 1981). The Fifth Circuit and, by extension, the Texas Supreme Court and Third Court of Appeals, were wrong to contradict this sound interpretation by the executive agency charged with interpreting the ADEA. Both *Smith* and this case were wrongly decided.

CONCLUSION

This Court is poised to answer the very question in the very case upon which this case was decided. To preserve the rights and claims of hundreds of class members, the Court need do no more than decide an issue already on the Court's docket. Petitioners respectfully request that their petition for writ of *certiorari* be, like the petition in *Smith*, granted in order to ensure that this issue be decided identically in both cases.

Respectfully submitted,

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2004 WL 35543

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,
Austin.

TEXAS PARKS & WILDLIFE DEPARTMENT,
Appellant
v.
Milburn DEARING; Kenneth Head; and
Mike Warren, Individually, and on behalf of
all others similarly situated, Appellees.

No. 03-03-00131-CV.

Jan. 8, 2004.

Richard D. Naylor, for Texas Parks & Wildlife Department.

Fred C. Head and John W. Thomas, for Milburn Dearing.

Before Justices KIDD, B.A. SMITH and PATTERSON.

OPINION

BEA ANN SMITH, Justice.

This is an interlocutory appeal from the denial of a plea to the jurisdiction and the certification of a class action asserting disparate-impact liability for age discrimination under the Texas Commission on Human Rights Act (the "Act"). *See* Tex. Lab.Code Ann. § 21.051 (West 1996). Appellees Milburn Dearing, Kenneth Head,

Mike Warren, and others (collectively Dearing)[1] brought a class-action lawsuit against their employer, the Texas Parks and Wildlife Department, asserting breach of contract and age discrimination resulting from the Department's reclassification of their game warden positions. The lawsuit sought a mandamus, damages, and declaratory and equitable relief. The Department filed a plea to the jurisdiction, asserting sovereign immunity and Dearing's untimeliness and failure to exhaust administrative remedies. The district court granted the plea as to the contract, declaratory-judgment, and mandamus claims but denied it as to the age-discrimination claim. The district court also entered an order granting Dearing's motion for class certification of the age-discrimination claim. The Department appeals the denial of its plea and the class-certification order. We affirm the district court's denial of the Department's plea to the jurisdiction on the issues of timeliness and exhaustion of administrative remedies. We reverse the order certifying the class because we conclude that the only cause of action for which it was certified – a disparate-impact theory of liability for age discrimination – is not available under the Act.

BACKGROUND

Milburn Dearing and his fellow employees are employed by the Department as game wardens. Prior to 1994, there were four rungs on the Department's game-warden "career ladder" – Game Warden I through Game Warden IV. Game wardens advanced from one rung to the next

[1] We will refer to Milburn Dearing by his full name when referring to him in his individual capacity.

every four years. The game warden advancements were based on years of service rather than a competitive, promotional process. Only the legislature could create an additional rung on the Department's ladder. In 1994, there were over a hundred game wardens at level IV, all with sixteen or more years of service at the Department. In an effort to provide additional compensation to these veteran game wardens, the Department reclassified 131 Game Wardens IV to the position "Field Sergeant Game Warden."[2] The position of "sergeant" already existed at the Department; thus no legislative action was required for the reclassification. The Department created some additional duties for these newly classified sergeants, including the supervision of deer-decoy operations and training of new officers. In 1995, the legislature passed a pay-parity rider, which required that "[t]he Director of the Parks and Wildlife Department may not provide for the compensation of a state-commissioned peace officer at a rate less than the rate paid by any other state agency to a state-commissioned peace officer performing similar duties." *See* Act of May 25, 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5857 (effective Sept. 1, 1995). Several months after this bill was passed, the Department had done nothing to determine whether the Field Sergeant Game Wardens were being paid in parity with officers performing similar duties in other law enforcement agencies. After pressure from members of the legislature, the Department's Executive Director,

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[2] There is evidence in the record to suggest that the Department's reclassification of the 131 employees fulfilled a return promise made by the Department or its former Executive Director, Andrew Sansom, to the Texas Game Warden Association in exchange for the Association's help with a legislative matter in 1993.

Andrew Sansom, appointed a committee to study the pay-parity issue. The committee returned a finding that the Field Sergeant Game Wardens were performing similar duties to sergeants in the Department of Public Safety (DPS) and that the game wardens should therefore be compensated the same as the DPS sergeants. The Field Sergeant Game Wardens were then given a raise in early 1996.

In 1997, the legislature added a fifth rung to the game warden ladder – Game Warden V – and adopted Salary Schedule C, which designated that the Game Warden V position be compensated at the C-6 pay level. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1452, 1997 Tex. Gen. Laws 5535, 6341 (effective Sept. 1, 1997). In the same bill, the legislature also provided that the adoption of Salary Schedule C could not result in a pay reduction for any classified employee, including game wardens. *See id.* at 6345 (the pay rider). As of the effective date of the 1997 bill, the Department reclassified the Field Sergeant Game Wardens to the newly authorized position of Game Warden V, because their duties matched the legislative description of Game Warden V. Moreover, as the only non-competitively acquired sergeant position in the Department, Field Sergeant Game Warden was therefore not a "true" sergeant position, but more appropriately another rung on the career ladder. However, because of the pay rider forbidding the reduction of any employee's pay, the so-called "grandfathered" Game Wardens V continued to be paid at their previous salary (equivalent to the then C-7 salary).

The appropriations act of 1999 created salary increases for all peace-officer positions in Texas. *See* Act of Apr. 23, 1999, 76th Leg., R.S., ch. 1589, 1999 Tex. Gen.

Laws 5446, 6262-6263 (effective Sept. 1, 1999). On September 1, 1999, the Department ceased classifying the grandfathered Game Wardens V at the C-7 level and reclassified all employees in that group at the C-6 level. As a result, the reclassified Sergeant Game Wardens, formerly paid at the C-7 level of $42,084, received a salary increase to $44,600 (the new C-6 pay) instead of $51,600 (the new C-7 pay). It is this reclassification, from the C-7 to the C-6 level, that Dearing asserts was unlawful age discrimination.

Milburn Dearing filed a complaint with the Texas Commission on Human Rights on February 22, 2000, alleging that reclassification of the grandfathered Game Wardens V from the C-7 to the C-6 pay level constituted age discrimination because it had a disproportionate impact on employees over the age of forty,[3] because none of the other sergeant positions at the Department were reclassified. The complaint asserted a class-action claim. The Commission accepted Milburn Dearing's complaint as timely; noted that the date of the discriminatory act was September 1, 1999; acknowledged that the complaint was a class-action claim; and issued Milburn Dearing a right-to-sue letter.

Dearing filed a class-action lawsuit in Travis County district court, alleging age discrimination and breach of contract, seeking a declaratory judgment that the Department violated the 1997 and 1999 appropriations acts, and seeking a mandamus to remedy the Department's

[3] Section 21.101 of the Act provides that discrimination on the basis of age is prohibited against individuals age forty or older. *See* Tex. Lab.Code Ann. § 21.101 (West 1996).

abuse in downgrading the grandfathered game wardens to pay level C-6. Dearing also filed a motion to certify the class, defined as "all Field Sergeant Game Wardens employed by the Texas Parks and Wildlife Department on September 1, 1999 who were reclassified from pay group C-7 to pay group C-6 and from Field Sergeant Game Warden to Game Warden V."

The Department filed a plea to the jurisdiction, asserting that (1) the age-discrimination claim was barred because the complaint filed with the Commission was untimely, plaintiffs failed to exhaust administrative remedies, and the reclassification was legislatively mandated; (2) the breach-of-contract claim was barred due to sovereign immunity; (3) the mandamus claim could not stand because a mandamus is an extraordinary remedy to be used only when there is no other adequate remedy at law, and plaintiffs had asserted various other causes of action sufficiently adequate; and (4) the declaratory-judgment claim could not stand alone as a cause of action because the Texas Uniform Declaratory Judgments Act is merely a procedural device for deciding cases already within the court's jurisdiction. The Department also filed a motion for summary judgment on four grounds: (1) Milburn Dearing did not file a timely complaint with the Commission; (2) Milburn Dearing did not file the lawsuit within the statute of limitations; (3) Milburn Dearing did not exhaust administrative remedies; and (4) the reclassification at issue was the result of a legislative mandate.

After a hearing, the district court granted the Department's plea to the jurisdiction on the breach-of-contract, declaratory-judgment, and mandamus claims but

denied it as to the age-discrimination claims. It denied the Department's summary-judgment motion.[4] The court also granted Dearing's motion for class certification. The certification order decreed the trial plan for the case: "the issues remaining to be tried in this case are: (a) Plaintiffs' disparate impact claims for age discrimination in violation of Tex. Labor Code Ann. § 21.051 [and defendants' affirmative defenses]." The Department brought this interlocutory appeal,[5] challenging the court's order certifying the class and denial of its plea to the jurisdiction.

DISCUSSION

I. Plea to the jurisdiction

Standard of review

A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action. *Rylander v. Caldwell,* 23 S.W.3d 132, 135 (Tex.App.-Austin 2000, no pet.). In order to prevail, the party asserting the plea to the jurisdiction must show that even if all the allegations in the plaintiff's pleadings are taken as true, there is an incurable jurisdictional defect apparent from the face of the pleadings, rendering it

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[4] The Department's summary-judgment motion also asserted official immunity on the part of Andrew Sansom, the Department's Executive Director at the time of the relevant actions underlying the suit. The district court granted summary judgment in favor of the Department on this ground only.

[5] Although only final judgments are typically appealable, certain interlocutory orders are appealable by statute, including orders certifying or refusing to certify a class and orders granting or denying a governmental unit's plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(3), (8) (West Supp.2004).

impossible for the plaintiff's petition to confer jurisdiction on the trial court. *See id.* Because subject-matter jurisdiction presents a question of law, we review the district court's decision *de novo. Id.* In reviewing a trial court's ruling on a plea to the jurisdiction, we do not look at the merits of the case; rather, we "construe the pleadings in favor of the plaintiff," look to the pleader's intent, and accept the pleadings' factual allegations as true. *Id.* "The truth of the plaintiff's allegations is at issue only if the defendant pleads and proves that the allegations were fraudulently made to confer jurisdiction on the court." *Id.* Further, "a court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 555 (Tex.2000).

Timeliness of complaint

The Department argues that its plea to the jurisdiction should have been granted because Dearing did not timely file his administrative complaint with the Texas Commission on Human Rights, a prerequisite to suit. *See Specialty Retailers, Inc. v. DeMoranville,* 933 S.W.2d 490, 491-92 (Tex.1996). A complaint with the Commission must be filed no later than 180 days after the alleged unlawful employment practice occurred. Tex. Lab.Code Ann. § 21.202 (West 1996). A complaint filed with the Commission is mandatory and jurisdictional. *Schroeder v. Texas Iron Works, Inc.,* 813 S.W.2d 483, 485-86 (Tex.1991). In other words, a person claiming that an employer has violated the Act must file a complaint with the Commission and otherwise exhaust administrative remedies before filing a civil action alleging violations of the Act. *Id.*

at 488. The complaint filed with the Commission must be filed within 180 days after the "alleged unlawful employment practice occurred," or the complainant's claim is time-barred. *DeMoranville,* 933 S.W.2d at 491-92.

Here, the alleged unlawful practice was the reclassification of the game wardens from C-6 to C-7, which occurred on September 1, 1999 – the date on which the 1999 appropriations act took effect. Until that date, the Department did not have the authority to downgrade the grandfathered game wardens because such action would have resulted in a decrease in their pay, which was specifically prohibited in the 1997 appropriations act. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1452, 1997 Tex. Gen. Laws 5535, 634. Even though the Department may have made the decision to reclassify the wardens in early August 1999, as evidenced by an inter-office memorandum, it could not legally do so until the 1999 act became effective. Milburn Dearing's complaint was filed on February 22, 2000 – within 180 days after the 1999 act's effective date of September 1.

Nonetheless, the Department argues that Dearing's complaint was untimely because the limitations period begins to run when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition or when the consequences of the act became most painful. *See id.* at 492-93. The Department asserts that Dearing knew of the reclassification by at least August 10, 1999, when he attended a mandatory meeting of game wardens held in New Braunfels. At this meeting, according to evidence submitted by the Department, the topic of reclassification "was discussed," and it was "made known to those in attendance" that the reclassification would become effective September 1, 1999.

Alternatively, the Department asserts that Dearing knew of the reclassification as early as either the 1997 legislation or the 1999 legislation. Each of the three dates the Department asserts began the running of the limitations period would push Dearing's complaint out of the 180-day filing window and make it untimely. We disagree with the Department's assertion.

The statute clearly hinges the running of the limitations period on the date of the "unlawful employment action." *See* Tex. Lab.Code Ann. § 21.202. Although *DeMoranville* holds that the limitations period begins to run on the date the employee is *informed* of the unlawful action, that case concerned an employer's established company policy and unequivocal communication to the employee that the policy would be enforced as to her, rather than an employer's decision to take a future action based on new legislation giving it authority for the first time to do so. *See DeMoranville,* 933 S.W.2d at 492-93 (holding that employee's notification that she would be terminated if she did not return to work within one year of start of her medical leave began limitations period running, rather than date on which she was actually terminated). We find this distinction significant.

Furthermore, whether Dearing knew definitively of the reclassification prior to September 1 is a fact question. A trial court must accept the allegations in a plaintiff's pleadings as true, unless the defendant pleads and proves that they were fraudulently made to confer jurisdiction. *Bland,* 34 S.W.3d at 554. The only evidence in the record going to what Dearing knew prior to September 1 is slim and does not establish that Dearing knew of the reclassification at any time before it actually occurred, on September 1. We also conclude that it is unlikely any reasonable

person in Dearing's position would have known prior to September 1 of the reclassification. *See Johnson & Johnson Med., Inc. v. Sanchez,* 924 S.W.2d 925, 928 (Tex.1996) (in wrongful termination case, statute of limitations begins running when employee receives unequivocal notice of termination or when reasonable person should have known of his termination). Lastly, the Commission accepted Dearing's complaint as timely and identified the date of discrimination as September 1, 1999. *See* Tex. Lab.Code Ann. § 21.202 (West 1996) (Commission must dismiss untimely complaint); *Gorges Foodservice Inc. v. Huerta,* 964 S.W.2d 656, 664 (Tex.App.-Corpus Christi 1997, no writ) (jury could rationally infer from Commission's issuance of right-to-sue letter that complaint was timely filed). We therefore hold that Dearing's complaint was timely filed with the Commission and overrule the Department's first issue.

Single-filing rule

The Department next asserts that the district court erred in not granting its plea to the jurisdiction because none of the plaintiffs exhausted their administrative remedies prior to filing suit, depriving the district court of subject-matter jurisdiction. The Department argues that even if Milburn Dearing's complaint with the Commission was timely filed, none of the other plaintiffs filed a complaint, and his complaint may not substitute for individual filings by each potential class member. Because we have concluded that Milburn Dearing's complaint was timely filed, we proceed to a discussion of whether the other plaintiffs may "piggyback" on his complaint, under the so-called "single-filing rule." *See Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1223 (5th Cir.1995); *Anson v. University*

of Tex. Health Sci. Ctr., 962 F.2d 539, 540-41 (5th Cir.1992).

Under federal law, the single-filing rule allows a plaintiff who has not filed a charge with the Equal Employment Opportunity Commission (EEOC) to piggyback on the EEOC complaint filed by another person who is similarly situated. *Mooney,* 54 F.3d at 1223. Two conditions must be met for one or more plaintiffs to join individual claims if the named plaintiff filed a timely administrative charge: the persons attempting to piggyback must be similarly situated to the person who actually filed the EEOC charge, and the charge must provide notice of the collective or class-wide nature of the charge. *Id.* Although no Texas court has had occasion to consider applying the single-filing rule to cases involving complaints filed with the Commission, "it is proper to look to interpretation of parallel federal laws" when interpreting the Act. *Stinnett v. Williamson County Sheriff's Dep't,* 858 S.W.2d 573, 576 (Tex.App.-Austin 1993, writ denied); *see also Austin State Hosp. v. Kitchen,* 903 S.W.2d 83, 87-88 (Tex.App.-Austin 1995, no writ) ("Because the Act seeks to promote federal civil rights policy and because Texas has little case law interpreting the Act, this Court looks to analogous federal law when appropriate.").

Section 21.201 of the Act provides support for the single-filing rule: "A person claiming to be aggrieved by an unlawful employment practice *or the person's agent* may file a complaint with the commission." Tex. Lab.Code Ann. § 21.201 (West 1996) (emphasis added). We hold that, under this statute, a person's "agent" could reasonably include a class representative. The statute at issue in the federal cases provides that "[n]o civil action may be commenced by an individual under this section until 60 days

after a charge alleging unlawful discrimination *has been filed* with the [EEOC]. Such a charge *shall be filed* . . . within 300 days after the alleged unlawful practice occurred." 29 U.S.C.A. § 626(d) (West 1999) (emphasis added); *Anson,* 962 F.2d at 541. The Texas statute, like the federal one, does not specifically include or exclude the single-filing rule. Because it is proper to look to interpretation of parallel federal laws, we adopt the single-filing rule fashioned by federal courts.

The policy behind the federal single-filing rule persuades us that it should apply to state complaints filed with the Commission:

> [I]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. As long as the EEOC and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no injustice or contravention of congressional intent occurs by allowing piggybacking.

Mooney, 54 F.3d at 1223 (internal quotations and citations omitted). We find that the same policy applies to a class-action suit filed under the Act when the single, filed complaint adequately puts the investigative agency and employer on notice of the extent of the allegations. It would be wasteful of resources for each of numerous plaintiffs to file separate complaints when the grievances are the same and one complaint could serve the same purpose. Here, there is no dispute that Milburn Dearing's complaint stated its intent to make the age-discrimination claim against the Department a class action. We hold that the single-filing rule applies to complaints filed with the Commission, that all members of the purported class are

similarly situated, and that Dearing's complaint adequately stated its class-action intent. We overrule the Department's second issue.

In a third issue, the Department asserts that its actions in reclassifying the Sergeant Game Wardens were legislatively mandated and that the legislature's actions were rationally related to a legitimate state interest, thus not subject to an attack based on age discrimination under *Kimel v. Florida Bd. of Regents*. *See* 528 U.S. 62, 83-84, 91, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (noting that rational-basis review applies to age discrimination by states and holding that ADEA does not abrogate states' sovereign immunity from suit by private individuals). However, the Department's reliance on *Kimel* is misplaced because the Supreme Court explicitly noted that its holding did not foreclose plaintiffs' ability to sue states under state age-discrimination statutes. *Id.* at 91-92, 120 S.Ct. 631. Furthermore, the Department has not pointed us to any legislative or statutory references from which we can conclude that its reclassification actions were required by law. We therefore overrule this issue.

II. Class Certification

Standard of review

A trial court's decision to certify a class must be reviewed for an abuse of discretion, but a reviewing court must not indulge every presumption in favor of the trial court's ruling. *Henry Schein, Inc. v. Stromboe,* 102 S.W.3d 675, 691 (Tex.2002). Although a trial court has discretion to rule on class-certification issues, and some of its determinations must be given the benefit of the doubt – like those based on its assessment of the credibility of

witnesses, for example – the trial court's exercise of discretion cannot be supported by every presumption that can be made in its favor. It is actual, not presumed, conformance with Rule 42 that must govern. *Id.* at 691; *Southwestern Ref. Co., Inc. v. Bernal,* 22 S.W.3d 425, 435 (Tex.2000); *see* Tex.R. Civ. P. 42.

Disparate impact

The trial court certified this class to bring an age-discrimination claim based on a disparate-impact theory of liability. The Department asserts that the class-certification order should be vacated because disparate-impact claims – the only cause of action for which the class was certified – are not viable under the Texas statute prohibiting age discrimination. In 1971, the United States Supreme Court held that disparate-impact claims may be brought under Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Disparate-impact claims arise from "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 609, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). Under a disparate-impact theory, liability may result even without an employer's discriminatory motive; disparate-treatment claims, by contrast, require proof that age actually motivated the employer's decision. *Id.* at 609-10, 113 S.Ct. 1701. Although *Griggs* made disparate-impact claims available under Title VII, the federal courts have struggled with the applicability of disparate-impact claims

under the ADEA. Because the state statute directs us to follow judicial interpretation of the ADEA in determining the availability of a state disparate-impact theory, we must review this debate between the federal courts of appeal. But first we begin our discussion with a close examination of the Texas statute.

Dearing seeks to sue under section 21.051 of the Act. That section prohibits unlawful employment discrimination on the basis of race, color, disability, religion, sex, national origin, or age. *See* Tex. Lab.Code Ann. § 21.051. Section 21.122 of the act, which specifically addresses disparate-impact cases, reads:

> (a) An unlawful employment practice based on disparate impact is established under this chapter only if:
>
> (1) a complainant demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of *race, color, sex, national origin, religion, or disability* and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity[.]
>
> . . . .
>
> (b) To *determine the availability of* and burden of proof applicable to *a disparate impact case involving age discrimination,* the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 [ADEA] and its subsequent amendments (29 U.S.C. Section 621 et seq.).

Id. § 21.122 (West 1996) (emphasis added). Subsection (a), which establishes disparate-impact claims, glaringly omits employment practices based on age discrimination.

Subsection (b) addresses age discrimination separately and hinges the availability of a disparate-impact cause of action on judicial interpretation of the analogous federal act, the ADEA. The legislature specifically parsed disparate-impact cases into two categories: those involving age discrimination, addressed in subsection (b), and those involving any of the six other unlawful acts of discrimination, covered in subsection (a). Thus, we must review "judicial interpretation" of the ADEA to determine whether a disparate-impact claim involving age discrimination is available under the Act.

The United States Supreme Court has not directly ruled on the availability of a disparate-impact cause of action for age discrimination under the ADEA. In *Hazen,* the Court focused on legislative intent to prevent age discrimination based on inaccurate and damaging stereotypes and declined to address disparate-impact claims: "[W]e have never decided whether a disparate impact theory of liability is available under the ADEA and we need not do so here." *See Hazen,* 507 U.S. at 609, 113 S.Ct. 1701 (citation omitted). Nevertheless, *Hazen* cast some doubt on the future of disparate-impact claims. The Court noted that "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610, 113 S.Ct. 1701. The court continued, "[W]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611, 113 S.Ct. 1701. Three concurring justices opined, "[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618, 113 S.Ct. 1701

(Kennedy, J., concurring). After *Hazen,* the United States Court of Appeals for the Seventh Circuit, which had originally recognized disparate-impact suits, reversed its position. *E.E.O.C. v. Francis W. Parker Sch.,* 41 F.3d 1073, 1076-77 (7th Cir.1994). Both the Third and Sixth Circuits have expressed considerable doubt as to whether a disparate-impact claim based on age discrimination survives after *Hazen,* but in neither opinion was the issue squarely before the court. *See Lyon v. Ohio Educ. Ass'n,* 53 F.3d 135, 139 n. 5 (6th Cir.1995); *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 732 (3d Cir.1995).

Those federal courts of appeal that have found disparate-impact claims available under the ADEA have based their determination on the similarity between the language in Title VII and the ADEA. *See Criley v. Delta Air Lines, Inc.,* 119 F.3d 102, 105 (2d Cir.1997); *Lewis v. Aerospace Cmty. Credit Union,* 114 F.3d 745, 750 (8th Cir.1997); *E.E.O.C. v. Local 350,* 998 F.2d 641, 648 n. 1 (9th Cir.1993). However, the majority of federal appellate courts have relied on distinctions in both the language and the legislative intent behind Title VII and the ADEA to hold that the disparate-impact theory crafted in *Griggs* is not actionable under the ADEA. *Mullin v. Raytheon Co.,* 164 F.3d 696, 700-01 (1st Cir.1999), *cert. denied,* 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *Ellis v. United Airlines, Inc.,* 73 F.3d 999, 1006-07 (10th Cir.1996); *Adams v. Florida Power Corp.,* 255 F.3d 1322, 1325-26 (11th Cir.2001).

The United States Court of Appeals for the Fifth Circuit has recently joined this majority in concluding that a disparate-impact theory of liability is not actionable under the ADEA in this circuit. *See Smith v. City of Jackson, Miss.,* 351 F.3d 183, 196 (5th Cir., 2003). We proceed

to a consideration of the reasoning behind the holding in *Smith* and the opinions that it follows.

Smith begins by noting the similarity between the ADEA and Title VII, the statute that gave rise to the disparate-impact theory of liability based on race-disparate impact, regardless of motive. *Id.* at 194. The language of the ADEA closely parallels that of Title VII, indeed "the prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard v. Pons,* 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). It is this similarity that persuaded the Second, Eighth and Ninth Circuits to recognize disparate-impact claims under the ADEA. *See Geller v. Markham,* 635 F.2d 1027, 1031-32 (2d Cir.1980); *Leftwich v. Harris-Stowe State Coll.,* 702 F.2d 686, 690 (8th Cir.1983); *Douglas v. Anderson,* 656 F.2d 528, 531 n. 1 (9th Cir.1981). However, *Smith* reaches a different conclusion by noting that the text of the ADEA differs from Title VII in an important respect: Section 623(f)(1) of the ADEA explicitly provides that an employer may "take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." *See* 29 U.S.C.A. § 623(f)(1) (West 1999); *Smith,* at 193-194. Neither this exception nor any parallel provision is found in Title VII. *See Smith,* at 193-194. As the Fifth Circuit recognized, this difference amounts to "a critical asymmetry" between the two statutes. *Id.; see also Adams,* 255 F.3d at 1325; *Mullin,* 164 F.3d at 701-02. When the "other reasonable factors" exception in the ADEA is read together with its general prohibition against age discrimination, the resulting construction follows: It is unlawful to "discriminate against any individual . . . because of such individual's age," except when that employment action is "based on . . . factors other than age." *Smith,* at 190 (citing *Mullin,* 164

F.3d at 702). The general prohibition and exception, read together, allow for discrimination against the protected age group if the discrimination is based on some factor other than age. The Fifth Circuit reasoned that, if the ADEA exception is not understood to preclude disparate-impact liability, "it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.'" *Id.* at 190 (quoting *Mullin,* 164 F.3d at 702). "Such a circular construction would fly in the teeth of the well-settled canon that 'all words and provisions of statutes are intended to have meaning and are to be given effect.'" *Mullin,* 164 F.3d at 702 (citation omitted).

In support of this rationale, the Fifth Circuit notes the Supreme Court has held that a similar exception in the Equal Pay Act precludes disparate-impact claims under that act. *See County of Washington v. Gunther,* 452 U.S. 161, 169-71, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). Section 206(d)(1) of the Equal Pay Act provides that wage discrimination on the basis of gender is prohibited, unless the wage "differential is based on any other factor other than sex." *See* 29 U.S.C.A. § 206(d)(1) (West 1998). Each of the federal circuits that has disallowed disparate-impact claims under the ADEA has relied on *Gunther's* interpretation of the similar "any other factor" exception in the Equal Pay Act to cast doubt on the availability of disparate-impact claims under the ADEA. *See Smith,* at 191-192; *Adams,* 255 F.3d at 1325; *Ellis,* 73 F.3d at 1008; *Mullin,* 164 F.3d at 702; *Francis W. Parker Sch.,* 41 F.3d at 1077. Although the ADEA exception references "*reasonable* factors other than age," while the Equal Pay Act omits the word reasonable, both the Fifth and Eleventh Circuits have found that the ADEA exception makes it more like the Equal Pay Act than Title VII, which has no such

exception. *See Smith,* at 191-192; *Adams,* 255 F.3d at 1325 n. 6.

Secondly, *Smith* notes that the legislative history of the ADEA is different from that of Title VII. The ADEA was enacted after the Secretary of Labor issued a report on age discrimination recommending that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways. *Smith,* at 195; *Mullin,* 164 F.3d at 702-03; *see* U.S. Dep't of Labor, The Older American Worker: Age Discrimination in Employment 2, 6, 21-25 (1965) (Congress should prohibit "arbitrary discrimination" based on age and age stereotypes, but factors that "affect older workers more strongly, as a group, than they do younger workers" should be addressed through programmatic measures to improve opportunities for older workers.). Title VII, on the other hand, had a broad remedial purpose: To "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs,* 401 U.S. at 429-30, 91 S.Ct. 849, *quoted in Smith,* at 194-195; *Adams,* 255 F.3d at 1325-26 ("history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact"); *Ellis,* 73 F.3d at 1008 ("legislative history of the ADEA suggests it was not enacted to address disparate impact claims"). "The cornerstone of Griggs's holding that disparate impact is cognizable under Title VII is thus the link between the history of educational discrimination on the basis of race and the use of that discrimination to continue to disadvantage individuals on the

basis of their race." *Smith,* at 195 (citing *Griggs,* 401 U.S. at 432, 91 S.Ct. 849). "[A]bsent from the scope of the ADEA are the historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination." *Id.*

This distinctive legislative intent to allow disparate-impact claims for Title VII discrimination but not necessarily for age discrimination is further revealed by comparing subsequent amendments to Title VII and the ADEA. Congress explicitly added a disparate-impact cause of action to Title VII in the 1991 Civil Rights Act. *See* Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1074-75 (1991) (codified at 42 U.S.C.A. § 2000e-2(k) (West 2003)) (hereinafter cited as Civil Rights Act of 1991); *see Ellis,* 73 F.3d at 1008; *Mullin,* 164 F.3d at 703. Although we can understand little of legislative intent from a body's failure to act, Congress added no such parallel provision to the ADEA, despite its amendment of other portions of the ADEA. *See, e.g.,* Civil Rights Act of 1991 at 115, 105 Stat. at 1079 (amending time period within which an employee may file civil actions); Civil Rights Act of 1991 at 302(2), 105 Stat. at 1088 (extending coverage of ADEA to congressional employees). While courts should ordinarily "tread slowly in premising statutory construction on the action (or inaction) of subsequent Congresses . . . [,]what transpires in a later legislative session sometimes constitutes a useful source of guidance in statutory interpretation cases." *Mullin,* 164 F.3d at 703 (citations omitted). Therefore, "Congress'[s] insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA – which was

undergoing revision at the same time by the same committees and in the same bill – highly significant."[6] *Id.*

Dearing insists that the reasoning of the *Smith* court is irrelevant because, unlike the federal scheme, the Texas legislature chose to prohibit age discrimination in the same statute that prohibits discrimination based on race, color, sex, national origin, religion, or disability, and thus disparate-impact claims should apply equally to all claims of discrimination. Dearing would have us ignore section 21.122, which states that disparate-impact claims are available for age discrimination in this state only if they are available under the ADEA. *See* Tex. Lab.Code Ann. § 21.122. Furthermore, the language in the Act – added in 1995 – mirrors the language added to Title VII in 1991 codifying disparate-impact cases under Title VII, except that the Texas Act treats disparate impact on the basis of age distinctly by removing it from the list of other forms of discrimination that give rise to disparate-impact liability. *Compare* Tex. Lab.Code Ann. § 21.122, *with* 42 U.S.C.A. § 2000e-2(k) (West 2003). We conclude, therefore, that the textual distinction between the ADEA and Title VII noted in *Smith* is specifically mirrored in the Act. *Smith* has declared that disparate-impact claims may not be redressed under the ADEA in this circuit. *See Smith,* at 195. We find the reasoning of the Fifth Circuit persuasive and

[6] The Fifth Circuit did not accord much significance to the congressional inaction in adding a disparate-impact claim to the ADEA but merely noted in passing the distinction with Title VII. *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 187 n. 1, (5th Cir. Nov. 13, 2003).

hold that there is no disparate-impact theory of liability under the Texas Act.[7]

The trial plan contained in the district court's order certifying the class states that the plaintiffs' disparate-impact claims for age discrimination and the defendants' affirmative defenses to such claims are the only issues remaining to be tried in this class action. Because the only certified class-action claim may not be redressed under the Act, the certification order is therefore vacated, and the cause is remanded for further proceedings consistent with this opinion. *See Warner-Lambert Co. v. Mills,* 117 S.W.3d 488, 494 (Tex.App.-Beaumont 2003, no pet. h.) (holding that causes of action for which class was certified were preempted by federal law and thus court lacked subject-matter jurisdiction to certify class).[8]

CONCLUSION

The district court's denial of the Department's plea to the jurisdiction was proper because Milburn Dearing's complaint was timely filed with the Commission on Human Rights and, under the single-filing rule, met the filing requirements for the other class members. However,

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[7] Dearing argues that this Court is not bound by Fifth Circuit precedent on issues of federal law. *See Penrod Drilling Corp. v. Williams,* 868 S.W.2d 294, 296 (Tex.1993); *Barstow v. State,* 742 S.W.2d 495, 500-01 n. 2 (Tex.App.-Austin 1987, writ denied). While we acknowledge the holdings of *Penrod* and *Barstow,* we find that the overwhelming majority of "judicial interpretation" of the ADEA is in accord with the decision reached in *Smith.*

[8] Because we reverse the order certifying the class on jurisdictional grounds, we do not reach the Department's final issue of whether the plaintiffs have met the numerosity, commonality, predominance, and superiority requirements of Rule 42. *See* Tex.R. Civ. P. 42.

because the only cause of action for which the class was certified, a disparate-impact theory of liability, is not available under the Texas Commission on Human Rights Act, we reverse the class certification and remand the cause to the district court for further proceedings consistent with this opinion.

NO. GN 102,867

MILBURN DEARING, ET AL, PLAINTIFFS, V. TEXAS PARKS & WILDLIFE DEPARTMENT, AND ANDREW SANSOM IN HIS INDIVIDUAL CAPACITY AND AS THE EXECUTIVE DIRECTOR OF THE TEXAS PARKS & WILDLIFE DEPARTMENT, DEFENDANTS.	§ § § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

ORDER ON CLASS CERTIFICATION

(Filed Feb. 5, 2003)

The court held a hearing on December 16 and 17, 2002 to consider the issue of class certification. In addition to the arguments and evidence presented by counsel, the court considered the (a) Plaintiffs' Motion for Class Certification, (b) Defendants' Response to Plaintiffs' Motion for Class Certification, (c) three-ring binders of material submitted by both parties, (d) Defendants' Motion for Summary Judgment, (e) Defendants' Motion for Summary Judgment, (e) Defendants' Supplemental Grounds for Summary Judgment, (f) Defendant Cook's Motion for Summary Judgment, (g) Defendants' Plea to the Jurisdiction and Special Exceptions, (h) Defendant Cook's Plea to the Jurisdiction, (i) Supplemental Argument and Documentary Support for Defendants' Plea to the Jurisdiction, (j) Defendants' Supplemental Evidence

in Support of Their Defendants' Motion for Summary Judgment and Defendants' Plea to the Jurisdiction and Special Exceptions, (k) Plaintiffs' and Intervenors' Objections to Defendants' Summary Judgment Proof and Supplemental Motion; (l) Plaintiffs' and Intervenors' Response to Defendants' Motion for Summary Judgment and Plea to the Jurisdiction, (m) Plaintiffs' and Intervenors' Response to defendants' Supplemental Ground for Summary Judgment, (n) Plaintiffs' and Intervenors' Cross Motion for Partial Summary Judgment, (o) Defendants' Response to Plaintiffs' and Intervenors' Cross Motion for Summary Judgment, (p) Defendants' Objections to Plaintiffs' and Intervenors' Cross Motion for Partial Summary Judgment, or in the Alternative Motion for Continuance, together with all of the proof and documents attached to such motions and responses. The Court after rigorously analyzing the foregoing motions, pleas, responses and all arguments and evidence presented to the Court is of the opinion the following Order should be entered. The Order shall supercede and take the place of any order or ruling previously made by the Court on any of the following matters and any such previous order, announcement, or ruling of the Court is hereby set aside.

It is **ORDERED, ADJUDGED** and **DECREED**, the Plaintiffs' Motion for Class Certification is **GRANTED** under Texas Rule of Civil Procedure 42)(b)(4).

It is **FURTHER ORDERED, ADJUDGED** and **DECREED**, that the class is defined as all Field Sergeant Game Wardens employed by the Texas Parks and Wildlife Department on September 1, 1999 who were reclassified from pay group C-7 to pay group C-6 and from Field Sergeant Game Wardens to Game Warden V.

The following trial plan was presented to the Court by Plaintiffs and Intervenors. The Defendants have stated their objections to same. The Court determines that the trial plan agreed upon by the Plaintiffs and Intervenors is reasonable. Therefore, it is **FURTHER ORDERED, ADJUDGED** and **DECREED** that the trial plan for this case be as follows:

1. There is no need for a bifurcated trial or more than one trial or jury in this case.

2. In light of the rulings made by the court on the pleas to the jurisdiction and motions for summary judgment, the issues remaining to be tried in this case are:

    a. Plaintiffs' disparate impact claims for age discrimination in violation of Tex. Labor Code Ann. § 21.051,

    b. Defendants' Affirmative defense that their actions were rationally related to a legitimate state interest,

    c. Defendants' affirmative defense that they were required by law to take the action is that they did in 1999, and

    d. Defendants' affirmative defense that they would have taken the same actions that they did with regard to Plaintiffs and Intervenors, irrespective of the ages of the Plaintiffs and Intervenors.

3. Plaintiffs must first establish that the re-classification made the basis of this suit had a disproportionate effect on persons who were 40 years of age or older. The reclassification applied to all members of the class at the same time and affected all of them in the

same manner. Thus, all of the proof and evidence relevant to this issue will be the same for all members of the class, so there is no need for separate procedures within the trial for individual plaintiffs on this issue.

4. If a directed verdict is not granted after the Plaintiffs' case in chief, then the affirmative defenses set out above will need to be tried. The reclassification applied to all members of the class at the same time and affected all of them in the same manner. Thus, all of the proof and evidence relevant to these defenses will be the same for all members of the class, so there is no need for separate procedures within the trial for individual plaintiffs on these affirmative defenses.

5. Damages for each individual member of the class will be a matter of mechanical calculation. The damages in this case are capable of being calculated with precision for each class member based upon mathematical formulas. There are no claims for mental anguish or any other type of damage that would require significant individual proof. Should the Plaintiffs prevail, the court will enter an order and/or injunction requiring Defendants to pay the class members their back pay, adjust their current pay and recalculate their retirement pay. The relevant computations will be straightforward. For those class members who have not retired as of the date of judgment, the amount of back pay will be the monthly salary difference between pay grade C7 and C6 for the period between September 1, 1999 and the date of judgment (hereinafter the "salary differential") times the number of months during

that period. For those who have retired by the time of judgment, the computation will be the salary differential times the number of months between September 1, 1999 and their retirement date. Those who have not retired will also be entitled to be compensated at the C7 level from the date of judgment forward. The Defendants will be ordered to calculate the retirement benefits for all class members as if they had been paid at the C7 level since September 1, 1999. There should be no change to any of the other variables that go into the retirement formula for any individual class member. The class members who retired prior to judgment will be entitled to an award of back retirement benefits for the difference, if any, between their benefits as actually paid and they benefits they would have been entitled to considering pay at the C7 level since September 1, 1999. All of the relevant information needed for these calculations, such as retirement date and retirement options selected, can be readily obtained from Defendants' records. If there is no stipulation on this evidence, then any evidence on the damages issues will be received during Plaintiffs' case in chief.

6. This case will be set for trial on June 16, 2003.

7. The discovery cutoff will be May 19, 2003.

8. Plaintiffs' deadline to designate experts will be April 1, 2003.

9. Defendants' deadline to designate experts will be April 15, 2003.

10. The deadline for designation of rebuttal experts will be May 1, 2003.

11. Plaintiffs' deadline to amend pleadings will be February 17, 2003.

12. Defendants' deadline to amend pleadings will be March 3, 2003.

Signed this the 5th day of February, 2003.

/s/ [Illegible]
Honorable Lora Livingston

AGREED AS TO FORM

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July 02, 2004

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Mr. James C. Todd
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RE: Case Number: 04-0212
Court of Appeals Number: 03-03-00131-CV
Trial Court Number: GN 102,867

Style: MILBURN DEARING, KENNETH HEAD, AND MIKE WARREN, INDIVIDUALLY, AND ON BEHALF OF ALL SIMILARLY SITUATED
v.
TEXAS PARKS AND WILDLIFE DEPARTMENT

Dear Counsel:

Today the Supreme Court of Texas denied the petitions for review in the above-referenced case.

Sincerely,

/s/ Andrew Weber

Andrew Weber, Clerk

by Nancy J. Vega, Chief Deputy Clerk

cc: Ms. Diane O'Neal
Ms. Amalia Rodriguez Mendoza

NO. GN 102867

MILBURN DEARING, Et al,	§	IN THE DISTRICT COURT
PLAINTIFFS,	§	
V.	§	TRAVIS COUNTY, TEXAS
TEXAS PARKS & WILDLIFE DEPARTMENT, Et al,	§	
DEFENDANTS.	§	200th JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

(Filed Nov. 13, 2001)

Under Tex. R. Civ. P. 42, Plaintiffs Milburn Dearing, Kenneth Head, and Mike Warren, individually, and on behalf of all others similarly situated, file this motion for class certification and in support thereof would respectfully show the court as follows:

I.

FACTUAL BACKGROUND

Plaintiffs were all employed by the Texas Parks and Wildlife Department as Field Sergeant Game Wardens. Plaintiffs and all other Field Sergeant Game Wardens were reclassified from pay group C-7 to pay group C-6. Their titles were changed to that of Game Warden V and they suffered a decrease in pay and other benefits. Other job classifications in the C-7 pay group within the Texas Parks & Wildlife Department, such as Specialty Sergeant, were not impacted. All of the 133 Field Sergeant Game Wardens, save one, were over the age of 40 at the time of the reclassification. Plaintiffs filed suit because the reclassification had a

disparate impact on a protected class, people over the age of 40, in violation of the Texas Commission on Human Rights Act. Plaintiffs have also filed claims for mandamus relief, breach of contract and declaratory relief.

Milburn Dearing filed a class-action complaint with the Texas Commission on Human Rights and the EEOC. The EEOC investigated the claims and concluded that the Field Sergeants had been the victim of unlawful age discrimination as a result of the reclassification. A copy of the EEOC's ruling is attached as Exhibit A. This suit was filed after EEOC's efforts to have the Field Sergeants reinstated with back pay failed.

Plaintiffs respectfully request an order certifying a class of all Field Sergeant Game Wardens employed by the Texas Parks & Wildlife Department on September 1, 1999 who were reclassified from pay group C-7 to pay group C-6 and from Field Sergeant Game Warden to Game Warden V. The reclassification affected each and every member of the class in the same way. Each and every member of the class was a Field Sergeant Game Warden when the reclassification to Game Warden V occurred. Each and every member of the class was being paid the exact same salary when the reclassification occurred. Each and every member of the class suffered precisely the same amount in lost salary as a result of the reclassification. There are no individual issues.

Defendant's course of conduct, the evidence supporting the allegations of the complaint, and the legal theories upon which the claims are based are identical for each member of the class. Each of the causes of action may be decided solely on issues common to each class member. All the requirements for class certification are met and the

advantages of the class action device to remedy 133 identical claims are obvious.

II.

CLASS DEFINITION

The proposed class is defined as all Field Sergeant Game Wardens employed by the Texas Parks & Wildlife Department on September 1, 1999 who were reclassified from pay group C-7 to pay group C-6 and from Field Sergeant Game Warden to Game Warden V. This definition is proper because it is precise, and all class members are presently ascertainable by reference to objective criteria. *Intratex Gas Company v. Beeson*, 22 S.W.3d 398 (Tex. 1999). Defendants maintain records from which the identity of each class member could be easily determined.

III.

ARGUMENT AND AUTHORITIES

Disparate impact cases, such as this one, are ideally suited for class treatment because they involve a single act or policy that affects each member of the class in the identical fashion. Discrimination claims may proceed under two theories, disparate impact and systemic disparate treatment. The disparate impact theory is used to challenge a facially neutral employment policy that affects a protected employee class more harshly. *Smith v. Texaco, Inc.*, 263 F.3d 394, 404 (5th Cir. 2001). This is a disparate impact case in that it is based on the fact that the reclassification affected employees over the age of 40 more harshly than younger employees. Proof of discriminatory intent is not required in a disparate impact case. *Id.* The plaintiff

must merely establish a policy that discriminates unfairly. *Id.* "Disparate impact cases in particular, which challenge specific, facially-neutral policies with proof of statistical disparities despite uniform application, implicate class-based claims." *Id.*

A. Rule 42 and the Standards for Certification.

Texas Rule of Civil Procedure 42, governing certifications of class actions, provides in relevant part:

> **(a). Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> * * *

No: 03-03-00131-CV

IN THE COURT OF APPEALS
FOR THE
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

TEXAS PARKS AND WILDLIFE DEPARTMENT
Appellants,
v.
MILBURN DEARING, KENNETH HEAD, AND MIKE WARREN, INDIVIDUALLY, AND ON BEHALF OF ALL SIMILARLY SITUATED
Appellees.

On Appeal from the 200th Judicial District Court
of Travis County, Texas

APPELLEES' BRIEF

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ATTORNEYS FOR THE PLAINTIFFS
AND CLASS MEMBERS

ORAL ARGUMENT REQUESTED

* * *

Class resolution of the issues is thus superior to any other method of dispute resolution. Accordingly, this Court

should affirm the trial court's certification of the class under Rule 42(b)(4).

Issue Four: The disparate impact theory of liability is available to a plaintiff suing for age discrimination under the Texas Commission on Human Rights Act.

1. Disparate impact is a viable theory of liability under the Texas Commission on Human Rights Act

Age discrimination, in the federal scheme, is prohibited by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, while other forms of discrimination are forbidden by a different statute – Title VII, 42 U.S.C. § 2000e-2. The United States Supreme Court has expressly held that disparate impact claims may be brought under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). It has yet to decide whether such claims are viable under the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

Courts from several federal circuits, however, have reasoned that a cause of action based on disparate impact should be allowed for age discrimination under the ADEA, just as for other forms of discrimination under Title VII.

> While it is true that the disparate impact theory first arose in cases under Title VII of the Civil Rights Act of 1964, the similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes, has led us

> to adopt disparate impact in cases under the ADEA.

E.E.O.C. v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984). *See also, Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2nd Cir. 1997); *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1993); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Arnold v. U.S. Postal Service*, 649 F.Supp. 676 (D.C. 1986). "Although disparate impact analysis was developed by the Supreme Court in Title VII race discrimination cases, and has been used by the Court only in that context, other courts have widely applied disparate impact analysis to age discrimination cases brought under the ADEA." *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir. 1990). The language of the ADEA closely parallels that of Title VII, and the purposes of the two statutes are similar. Thus, many circuits conclude that disparate impact claims are permissible under the ADEA. *See, e.g., Geller v. Markham*, 635 F.2d 1022, 1032 (2nd Cir. 1980), *cert. den.*, 451 U.S. 945 (1981).

Courts from some other circuits have, however, come to the opposite conclusion. Their justification for this conclusion is that the ADEA and Title VII are separate statutes, with different legislative histories, and different language. *See, Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1998); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001). However, the reasoning that distinct legislative histories counsel against including disparate impact liability within age discrimination statutes can not apply to the Texas Commission on Human Rights Act. The Texas legislature put age discrimination in the same statute as the forms of discrimination

forbidden in Title VII and uses precisely the same language for each.

> An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

Tex. Labor Code Ann. § 21.051. Thus, it cannot be argued that different statutory language or intent between age discrimination and the other forms of discrimination exist under the Texas statute. It is also significant to note that the Texas statute prohibits "any" "manner" of discrimination. That language is not contained in the ADEA.

The business necessity defense, which the Department invokes here, prohibits liability where there is a legitimate reason for an action that has a disparate impact on a protected class. This defense furnishes employers all the protection they legitimately need to defend claims such as those asserted in this case.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory

> in operation. The touchstone is business necessity.

Griggs, 401 U.S. at 431. If the disparate impact theory is done away with, then artificial, arbitrary and unnecessary policies would be allowed to cause age discrimination.

As stated above, there are no decisions from Texas courts on this issue. However, the Texarkana Court of Appeals after noting the split of authority in the federal courts regarding disparate impact claims under the ADEA, nonetheless recognized disparate impact as a viable theory under the anti-retaliation provision of the Worker's Compensation Act. *Fenley v. Mrs. Baird's Bakeries, Inc.*, 59 S.W.3d 314, 326 (Tex. App. – Texarkana 2001, pet. Denied). The court reasoned that recognizing such a claim was necessary to further the purposes behind the act. *Id.* The same holds true here.

2. Damages are properly handled in the trial plan.

The Department is off base in complaining about the trial plan for a number of reasons. First, the method of calculating the damages for the different members of the class was discussed above. There can be no real dispute about how these calculations should be made or about the variables such as age and length of service for each employee. Thus, the trial plan as specified in the order is more than adequate to address these issues.

Second, the Department's challenge is an evidentiary one. The Department did not request findings of fact or a reporter's record. "In making its class certification decision, the trial court can consider the pleadings and other

material in the record, along with the evidence presented at the hearing." *Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146, 149 (Tex. App. – Austin 1995, writ dism'd w.o.j.). When there are no findings of fact and no reporter's record, the court of appeals must presume the trial court found every fact necessary to susstain its order. *Sun Coast Resources, Inc.*, 967 S.W.2d at 529.

Third, the Department never articulated a single specific objection to the trial plan.

> As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trail court by a timely request, objection, or motion that: (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint . . .

Tex. R. App. P. 33.1

04-0214

IN THE SUPREME COURT OF TEXAS

MILBURN DEARING, KENNETH HEAD, AND MIKE WARREN, INDIVIDUALLY, AND ON BEHALF OF ALL SIMILARLY SITUATED

Petitioners,

V.

TEXAS PARKS AND WILDLIFE DEPARTMENT

Respondent.

On Petition for Review from the Court of Appeals
For the Third District at Austin, Texas
Cause No. 03-03-131-CV

PETITIONERS' PETITION FOR REVIEW

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* * *

reasoning of the majority opinion in the Fifth Circuit in *Smith v. City of Jackson, Miss.*, 351 F.2d 183 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 2004 WL 297025, 72 USLW 3539 (2004) and held that disparate impact

claims are not cognizable under the ADEA and as a consequence are not cognizable under the Texas Commission on Human Rights Act either. Almost immediately after the Austin Court of Appeals reached its decision in this case, the United States Supreme Court granted *certiorari* in *Smith* in order to resolve the five-to-three split among the federal circuits on the issue of whether disparate impact claims are cognizable under the ADEA.

With the granting of *certiorari* in *Smith*, the United States Supreme Court is poised to issue the definitive "judicial interpretation of the [ADEA]." This Court should grant the petition for review so that the decision in this case can be consistent with the judicial interpretation of the ADEA as will soon be determined in *Smith*. Regardless of the outcome of this interlocutory appeal, the case below will certainly still be going on as to other claims when *Smith* is decided. In the event the United States Supreme Court rules disparate impact claims may be brought under the ADEA it would be a total miscarriage of justice to deny the Field Sergeants the right to bring such a claim in their case based simply on the timing of the decision in *Smith* being after the decision of the Austin Court of Appeals.

ARGUMENT

1. The Petition should be granted based on *Smith*.

The availability of an age discrimination claim based on the disparate impact theory is addressed in § 21.122 of the Texas Commission on Human Rights Act:

> (a) An unlawful employment practice based on disparate impact is established under this chapter only if:
>
> (1) a complainant demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of *race, color, sex, national origin, religion, or disability* and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity[.]
>
> . . . .
>
> (b) To *determine the availability of* and burden of proof applicable to *a disparate impact case involving age discrimination*, the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 [ADEA] and its subsequent amendments (29 U.S.C. Section 621 et seq.).

Tex. Labor Code Ann. § 21.122. At the time the trial court heard the motion for class certification, three federal circuits (Second, Eighth and Ninth) had held the disparate impact theory of liability was cognizable under the ADEA, while four others (First, Seventh, Tenth, and Eleventh) had had held it was not.[1] Although

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[1] Claims are cognizable – *Smith v. Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller v. Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis v. Aerospace Community. Credit Union*, 114 F.3d 745, 750 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom, Kelleher v. Aerospace Cmty. Credit Union*, 523 U.S. 1062 (1998); *Frank v. United Airlines Inc.*, 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001).

Claims are not cognizable – *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (CA1 1999); *EEOC v. Francis W. Parker School*, 41 F.3d 1073,

(Continued on following page)

it had not addressed the issue under the ADEA, the United States Supreme Court interpreted nearly identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), to encompass both disparate treatment and disparate impact theories of liability. *See, Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Just a few days before the oral argument for this case in the Austin Court of Appeals, the Fifth Circuit issued its opinion in *Smith* in which two of the three judges on the panel sided with the four circuits holding there was no cognizable claim. Judge Stewart dissented vigorously, arguing that the ADEA's "reasonable factors other than age" language merely codified a business necessity exception to disparate impact claims analogous to the one available under Title VII, as opposed to prohibiting such claims outright. He further rejected the majority's reliance on the equal Pay Act. He argued that the majority ignored the fact that the "terms 'any' [as found in the EPA] and 'reasonable' [as found in the ADEA] are not synonymous." Turning to the legislative history, Judge Stewart noted that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of concealed discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." Ultimately, Judge Stewart concluded that the majority erred when

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1076-78, 1079 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002).

it refused to find disparate impact claims cognizable under the ADEA.

The United States Supreme Court granted *certiorari* in *Smith* to resolve the conflicting judicial interpretations of the ADEA. Right now there is no settled judicial interpretation of the ADEA on this issue. Thus, the § 21.122 cannot be properly applied. That, however, will change in the very near future once the Supreme Court decides *Smith*. The petition should be granted so that the undisputed judicial interpretation of the ADEA can be applied to this case. If the United States Supreme Court interprets the ADEA to allow a claim for disparate impact, then the decision of the Austin Court of Appeals should be reversed. If not, then the decision below should be affirmed.

The proper construction of § 21.122 is the central issue in this case. It is not possible to construe that statute until the Supreme Court rules in *Smith*.

The Austin Court of Appeals reversed the ruling on class certification solely on the basis of the Fifth Circuit's decision in *Smith*.

> *Smith* has declared that disparate-impact claims may not be redressed under the ADEA in this circuit. *See Smith*, at 195. We find the reasoning of the Fifth Circuit persuasive and hold that there is no disparate-impact theory of liability under the Texas Act. The trial plan contained in the district court's order certifying the class states that the plaintiffs' disparate-impact claims for age discrimination and the defendants' affirmative defenses to such claims are the only issues remaining to be tried in this class action. Because the only certified class-action claim may

> not be redressed under the Act, the certification order is therefore vacated, and the cause is remanded for further proceedings consistent with this opinion.

Texas Parks & Wildlife Dept. v. Dearing, ___ S.W.3d ___, 2004 W.L. 35543 (Tex. App. – Austin 2004, pet. pending). If *Smith* was wrongly decided, then the decision below lacks support. It would be fundamentally unjust for the Field Sergeants to loose their potentially valid claims (which is what would happen if this Petition is denied) after the United States Supreme Court has agreed to hear an appeal of the *Smith* decision. This point is of particular importance here where the rights of a class consisting of many employees are involved, as opposed to just one or two. An issue of such importance to so many should be decided on the merits of what the law provides (in this case the ADEA) and not upon the fact that *certiorari* was granted but the opinion not issued when the case was heard.

2. The Court of Appeals erroneously evaluated the merits of the case

The decision of the court of appeals is directly contrary to the well-established rule that "[d]eciding the merits of the suit in order to determine the scope of the class or its

* * *